

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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)
In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
Liability Litigation)
)
) Wed., March 15, 2018
) Minneapolis, Minnesota
) Courtroom 12 West
) 9:40 A.M.
)

(STATUS CONFERENCE)

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - United States District Court
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1 (9:40 a.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good morning. Please be seated.

5 Let me first apologize for the delay. That was my
6 fault. I forgot to tell Tim that I'm here, not there, and
7 so my apologies for that.

8 We have everybody's appearance on the record,
9 Cathy took everything down. I don't need to go through that
10 again, or not?

11 MR. BLACKWELL: Probably --

12 THE COURT: It's a small enough group. Let's get
13 everybody's appearance again.

14 MS. ZIMMERMAN: Genevieve Zimmerman for
15 Plaintiffs.

16 MS. CONLIN: Jan Conlin for Plaintiffs.

17 MR. GORDON: Good morning. Ben Gordon,
18 Plaintiffs.

19 MR. BLACKWELL: Good morning. Jerry Blackwell
20 speaking for 3M.

21 MS. YOUNG: Mary Young for Defendants.

22 MS. AHMANN: Bridget Ahmann for Defendants.

23 THE COURT: Okay. And the record should reflect
24 we have two other plaintiffs' lawyers who have appeared,
25 Mr. Hodges and Mr. Lauricella. Welcome.

1 And I'm sure you all remember the judge mentioned
2 at the last status conference she would not be here today,
3 so she's not, and so it's just me. And we have everybody on
4 the phone. Would somebody just unmute so that we know that
5 you are hearing us and just unmute and say, "Hi. Here we
6 are."

7 (No response)

8 Can anybody hear us on the phone?

9 (No response)

10 Does anybody have a name of somebody that we know
11 is on the phone so I can call somebody out and call them?

12 MR. HODGES: Judge, before we got started, it
13 sounded like a bunch of people getting hung up on right
14 before you came out, so -- it made that same sound when they
15 disconnect.

16 THE COURT: Maybe they just got bored and left.

17 MR. GORDON: I just got a text from a lawyer in
18 Florida who says they're on the line, Your Honor.

19 THE COURT: Okay. Then I'll take that as
20 sufficient evidence.

21 Okay. So now I guess we should just start going
22 through the joint agenda.

23 The first item on the joint agenda is the pretrial
24 orders and case schedule, which is broken down into
25 information about Gareis, the first bellwether trial, and

1 then the repopulation of the bellwether pool.

2 So who wants to start? Ms. Zimmerman?

3 MS. ZIMMERMAN: Yes, Your Honor. Thank you. May
4 it please the Court.

5 I don't think that there's much to update the
6 Court on with respect to Gareis, at least in terms of the
7 scheduling order. The dispositive motions have been filed
8 and responded to, replies will be forthcoming, and that is
9 scheduled for a hearing on April 12th, and, of course,
10 trial's set to start in May.

11 With respect to repopulating the bellwether pool,
12 we were before Your Honor on Monday with respect to some of
13 those issues. Both parties submitted their 16 nominations
14 of representative cases for consideration in this next
15 round. We heard back from the Court promptly the next day
16 identifying 12 of the 16 mutual nominations.

17 I do note that of the 16 that were nominated by
18 Defendants, two of them were in that group of three, so we
19 talked about this on Monday, that there were these blanket
20 sales. There were three out of 70 available where the
21 defendants' records said no record of Bair Hugger sales had
22 been made in the 12 months prior to the surgery. Defendants
23 nominated two of those cases and both of those are now on
24 the list of 12.

25 Now, it is my understanding from speaking with

1 counsel just before we started that they have withdrawn
2 challenges as to Plaintiffs' proof of use on at least four
3 of the cases. Those are Arnold, Henderson, Partlow and
4 Ramirez. And I think as I understand defense counsel's
5 position, it is their representation today that they are no
6 longer maintaining challenges to the proof of product that
7 Plaintiffs have offered on all 12 cases.

8 THE COURT: Oh, okay, because I was going to say
9 my notes reflected that Ramirez and Henderson were the only
10 two that are on Judge Ericksen's list of 12 where there was
11 still a challenge, and now you're telling me that even those
12 two are gone?

13 MS. ZIMMERMAN: That is my understanding. We
14 received a letter from defense counsel just as we were
15 walking into court and we spoke briefly about it ahead of
16 time.

17 THE COURT: Okay. I will clarify that with them
18 momentarily. Is there anything else you want to tell me
19 about the plaintiffs' -- because my question to you was
20 going to be: In the position statements in the joint
21 agenda, you mention -- talking about this issue of the
22 challenge to Bair Hugger use, that it required resolution
23 before the March 20 deadline for striking the things, and I
24 was going to ask what relief you're looking for exactly. Do
25 you want me to determine that there is adequate evidence of

1 Bair Hugger use, but if it's all moot, I guess I won't even
2 ask my question.

3 MS. ZIMMERMAN: I think that based on the
4 representations of Ms. Young -- and I'm sure she'll correct
5 me if I'm wrong -- that they are no longer maintaining
6 challenges to Plaintiffs' proof of product, and if that's
7 true, then I think the issue is moot.

8 THE COURT: Okay. Anything else then with regard
9 to the first item in the agenda before I hear from
10 Defendants?

11 MS. ZIMMERMAN: Not from the plaintiffs'
12 perspective, Your Honor.

13 THE COURT: Okay. Ms. Young?

14 MS. YOUNG: Good morning, Your Honor. Thank you.

15 Yes, as Ms. Zimmerman said, Defendants have
16 withdrawn our challenges at this time as to there were four
17 cases where there was still the challenge to product use,
18 and we've indicated to Plaintiffs that we will allow the
19 discovery to play out in those cases and take them at their
20 word that they have the adequate proof, and we'll be back
21 before the Court, I suppose, at some point if that does not
22 bear out.

23 THE COURT: Okay. So that means Ramirez and
24 Henderson, which are on the list of 12, are just like any
25 other case now on the list of 12, and sometime between now

1 and March 20th you will each exercise strikes and will end
2 up with a list of eight, correct?

3 MS. YOUNG: Correct. And, Your Honor, I believe
4 it was also -- Partlow and Arnold were two cases that
5 Plaintiffs nominated where we had challenged product use.

6 THE COURT: Oh.

7 MS. YOUNG: But in any event, they have all been
8 withdrawn at this point.

9 THE COURT: Okay. Thank you.

10 MS. YOUNG: Thank you.

11 THE COURT: So just not to put too fine a point on
12 it, with regard to the first item on the joint agenda,
13 there's nothing for the Court to do, is that correct?

14 MS. ZIMMERMAN: I think that that's right, Your
15 Honor.

16 THE COURT: Ms. Young.

17 MS. YOUNG: With respect to the bellwether issue,
18 yes, that's correct, Your Honor.

19 THE COURT: All right. And that brings us then to
20 item number 2, which is the Plaintiffs' fact sheets. As I
21 understand it, before leaving, Judge Ericksen entered an
22 order, docket entry number 1167, resolving the issues with
23 regard to the alleged failures in the plaintiffs' fact
24 sheets and that there are other lists provided for going
25 forward. Then the next status conference, docket entry

1 1167, deals with the defendants' request to dismiss cases
2 that have been on the list for the requisite number of times
3 under the Pretrial Order Number 14.

4 Anything else anybody wants to tell me about the
5 plaintiffs' fact sheets?

6 Ms. Zimmerman.

7 MS. ZIMMERMAN: Yes, Your Honor. Judge Ericksen
8 did indeed enter an order with respect to the fact sheet
9 issue. I believe that the order dated March 12th should be
10 docketed in each of the individual cases, but just for
11 purposes of the record, it's our understanding that the
12 Strain matter, which is 17-CV-1978, was dismissed; as was
13 Key, that is 17-CV-2581; also Campbell, that's 17-CV-2919,
14 just dismissed on the 12th of March; Quinan, Q-U-I-N-A-N,
15 which is 17-CV-3445; Gallo, which is 17-CV-3666; Ramirez,
16 17-CV-3721; Hamel-Fogleboch, which is 17-CV-4500; Horn,
17 which is 17-CV-4515; and Williams, 17-CV-4519. Some of
18 these attorneys representing -- in fact, most of the
19 attorneys representing these folks did in fact file
20 responses. Most indicated that their clients had been
21 unresponsive and the order dismissing those cases was filed
22 on the 12th.

23 There were three cases where Judge Ericksen denied
24 the motion for dismissal at this time, and that is Hufford,
25 17-CV-2372; Thornton, 17-CV-3834; and then Slaughter,

1 17-CV-4431.

2 And then there were I think five cases where there
3 was a joint stipulation to be dismissed that was also filed,
4 and that's all we've got --

5 THE COURT: And just to be clear, the Ramirez that
6 you mentioned which is 17-3721, is different and unrelated
7 to the Ramirez which is 17-1078, which is on the list of
8 potential bellwethers.

9 MS. ZIMMERMAN: That is my understanding, Your
10 Honor. Yes, the Ramirez that's still on the list is
11 17-CV-1078.

12 THE COURT: Okay.

13 MS. ZIMMERMAN: So that one's still pending.

14 THE COURT: Thank you.

15 MS. ZIMMERMAN: Thank you.

16 THE COURT: Anything else on this, Mr. Blackwell?

17 MR. BLACKWELL: No, Your Honor.

18 THE COURT: Okay. And then the update on cases in
19 the MDL. I've got 4,299. Anything else I need to know
20 about that, Ms. Zimmerman?

21 MS. ZIMMERMAN: Yes. The Szerlag firm -- pardon
22 me -- the Pritzker firm informed me this morning that there
23 are a total of 4,571 complaints that have been filed as of
24 this morning, and the discrepancy between those two numbers
25 may be dismissals. I'm not sure.

1 THE COURT: Okay. Anything with regard to the
2 number of cases, Mr. Blackwell?

3 MR. BLACKWELL: Your Honor, no, beyond what
4 Ms. Zimmerman just said.

5 THE COURT: Okay. Anything I need to know about
6 state court proceedings? I understand Judge Leary has
7 dismissed all of the Ramsey County cases, has denied the
8 request for reconsideration.

9 What's your deadline then for appealing all of
10 those, Ms. Zimmerman?

11 MS. ZIMMERMAN: The notice of appeal, Your Honor,
12 is due on March 26th and then the briefing will be due I
13 believe within 30 days of that.

14 THE COURT: Okay.

15 MS. ZIMMERMAN: We're finalizing one issue with
16 respect to whether or not the transcript for the punitive
17 damages motion was officially entered in Ramsey County or
18 not, but that's a housekeeping matter we can get sorted out
19 and that will be timely done.

20 THE COURT: Okay. Anything else with respect to
21 the other non-Ramsey County cases?

22 MS. ZIMMERMAN: No, Your Honor.

23 THE COURT: Anything about the Canadian action?
24 I'm now on item number 5 of the joint agenda.

25 MS. ZIMMERMAN: Nothing from Plaintiffs.

1 MR. BLACKWELL: No, Your Honor.

2 THE COURT: Item 6 on the agenda is additional
3 pretrial orders. There are no pending pretrial orders.

4 Item 7 is the status of discovery. We had the
5 hearing on Monday relating to Dr. Minkowycz. I believe I
6 entered that order, correct, granting the protective order,
7 Minkowycz is not going to be deposed?

8 MS. ZIMMERMAN: That's correct, you granted the
9 defendants' motion, Your Honor.

10 THE COURT: What about Dr. Augustine? So we still
11 haven't finished with Augustine and Benham, Ms. Zimmerman?

12 MS. ZIMMERMAN: No, Your Honor. I believe we
13 received notices now with respect to those depositions.

14 THE COURT: Would you use the podium, because I'm
15 not sure the folks on the phone are hearing you from the
16 microphone that's --

17 MS. ZIMMERMAN: Usually people can hear my voice
18 all right, but glad to step up.

19 (Ms. Zimmerman approaches lectern)

20 MS. ZIMMERMAN: We received notices for the
21 depositions finally of Dr. Scott Augustine, Mr. Randall
22 Benham, and Brent Augustine. I believe that those are going
23 to go forward on March 29th. I will say that the plaintiffs
24 have requested, as we indicated in the joint status report,
25 an opportunity to have an hour and a half with

1 Dr. Augustine, along with 15 minutes each for Mr. Benham and
2 Mr. Brent Augustine. We were informed this week that
3 Mr. Augustine's counsel is going to decline to offer any
4 additional time beyond what the Court has already ordered.

5 As a refresher, when defense counsel asked for
6 leave of court to take this additional discovery, we
7 initially opposed and we said if the Court were to grant
8 Defendants' motion and allow the depositions to go forward,
9 we certainly would request opportunity to participate. It
10 is our understanding at this point that Mr. Benham is going
11 to decline to allow that to happen and just wanted to put
12 that on the record at this point.

13 THE COURT: Are you requesting anything from the
14 Court in that regard?

15 MS. ZIMMERMAN: There's not a formal motion before
16 Your Honor, so just keeping you apprised.

17 THE COURT: Okay. Mr. Blackwell?

18 MR. BLACKWELL: Your Honor, mindful of the --
19 Jerry Blackwell for 3M. Mindful of the fact that there
20 isn't a motion before the Court, I just want to clarify one
21 thing.

22 When the matter of additional time for us to
23 complete Augustine was brought before this Court, Plaintiffs
24 did have a position, and it wasn't their position that they
25 were simply requesting an opportunity to participate. Since

1 they're at the deposition, they obviously participate.

2 What they requested was additional time to take
3 depositions of Al Van Duren and of Mr. Albrecht, and it's
4 what they requested in oral argument, it's what they
5 requested in their moving papers, and it's what Your Honor
6 ruled on in the order, that that wouldn't be permitted. So
7 that's formally what they asked for and there hasn't been
8 any formal request for any relief to take this additional
9 discovery out of time by Plaintiffs despite the Court having
10 invited it when we were here last month, as well as inviting
11 them to reach out to Benham to try to get more time, which
12 they had not done, so we did yesterday. And so the response
13 of Mr. Benham was in response to our inquiry, not even the
14 Plaintiffs, so I just wanted to clarify that.

15 THE COURT: Okay. And are these three folks,
16 Benham, Brent Augustine and Scott Augustine, going to be
17 witnesses at trial or the depositions will just be useful if
18 somebody wants to use them?

19 MR. BLACKWELL: No, Your Honor. They all are kind
20 of very much fair game for telling the complete story and
21 putting into context the claims that are made against the
22 Bair Hugger. They all three figure somewhat prominently in
23 it, so they're on our lineup.

24 THE COURT: They're on your lineup of witnesses
25 for live testimony at Gareis.

1 MR. BLACKWELL: Potentially, yes, Your Honor.

2 THE COURT: Okay. Thank you.

3 MR. BLACKWELL: Thank you, Your Honor.

4 THE COURT: Anything else on that issue,

5 Ms. Zimmerman?

6 MS. ZIMMERMAN: Your Honor, to the extent that
7 Counsel has represented that we participated in the one
8 deposition that did go forward, we were there, but we
9 certainly don't represent Dr. Augustine, and I believe
10 Ms. Conlin had the opportunity to ask maybe one question
11 that said, "Have I ever contacted you? Are you involved in
12 this MDL at all?" And the answer was, "No," hasn't been
13 contacted, not involved in any way. But to the extent that
14 Counsel represented we have in fact participated and had an
15 opportunity to depose these witnesses, that's not true. I
16 don't know if these witnesses are going to be live at the
17 Gareis matter or not, so I guess we'll find that out.

18 THE COURT: Do you have any intention of calling
19 them?

20 MS. ZIMMERMAN: Well, I don't know.

21 THE COURT: Okay.

22 MS. ZIMMERMAN: We don't know what we don't know,
23 so we'll see.

24 THE COURT: Okay. Fair enough.

25 All right. The last thing on the agenda is item

1 8, the status of various procedural matters.

2 MS. ZIMMERMAN: Yes, Your Honor, and this has to
3 do with somewhat new rules about how under-seal documents
4 are processed in the district and how we best process those
5 moving forward. And I think we're all still kind of getting
6 used to this process where we file things under seal and
7 then there's a joint motion about whether or not the exhibit
8 should continue to be under seal. I believe that there are
9 a few motions pending before the Court. Because we
10 sometimes get questions from the Clerk's Office about
11 under-seal status of documents, we thought that we would
12 inquire about anything that we might be able to do to
13 resolve the issue with respect to the sealed status of some
14 of these documents, many of which were used in open court
15 during the **Daubert** and summary judgment hearings.

16 THE COURT: Are there -- so as I understand the
17 rule, you first file things under a temporary seal, which
18 the parties have the capacity to do.

19 MS. ZIMMERMAN: Yes.

20 THE COURT: And then you're required to file a
21 joint motion either to continue sealing or to unseal, and
22 that's when everybody gets to weigh in on what should happen
23 going forward.

24 MS. ZIMMERMAN: That's correct.

25 THE COURT: Has that second step happened with

1 respect to all of the ones you're talking about?

2 MS. ZIMMERMAN: I believe so, Your Honor.

3 THE COURT: And so I need to go through the docket
4 and identify which ones are outstanding, because those are
5 things that all fall to me under the theory of everything
6 rolling downhill.

7 (Laughter)

8 MS. ZIMMERMAN: Well, I'm happy to be further
9 downhill and I can identify the docket numbers for Your
10 Honor if that would be helpful.

11 THE COURT: Is that something you have on the tip
12 of your tongue right now?

13 MS. ZIMMERMAN: I don't have it on the tip of my
14 tongue, but I can get it for you today.

15 THE COURT: Okay. Yeah, why don't you do that.

16 MS. ZIMMERMAN: Sure.

17 THE COURT: And just communicate with my chambers
18 through Chad the docket numbers of the ones we haven't ruled
19 on yet and we'll make a point to get right on them.

20 MS. ZIMMERMAN: Fantastic. Thank you, Your Honor.

21 THE COURT: Thank you.

22 Anything else on that, Mr. Blackwell?

23 MR. BLACKWELL: On that issue, no, Your Honor.

24 THE COURT: Okay. Is there any other issues to
25 come before the Court on this status conference beyond

1 what's in the joint agenda?

2 Mr. Blackwell, you seem to have something.

3 MR. BLACKWELL: Yes, Your Honor.

4 There is one other issue and I raise this under
5 the heading of when we come to the Court to seek some
6 relief, at least the rejoinder won't be, "They didn't bring
7 this up at the status hearing," so I'm simply bringing it
8 up.

9 There's no formal request for relief by the Court
10 in any respect at this time, but just yesterday afternoon I
11 saw and we got a one-page declaration from Dr. Presnal,
12 which is a name that may not mean anything to Your Honor,
13 but --

14 THE COURT: Dr. who?

15 MR. BLACKWELL: Presnal, P-R-E-S-N-A-L.

16 THE COURT: Okay.

17 MR. BLACKWELL: He's the treating physician for
18 Mr. Gareis. He had already been deposed, experts already
19 been disclosed, and then we get this one-pager that was sort
20 of slipped into the motion papers in response to our summary
21 judgment motion where -- well, I have a copy. It's very
22 brief. It's not even one page, Your Honor, if I could show
23 it to Your Honor.

24 (Document handed to the Court)

25 THE COURT: It's docket entry number 59-10. Have

1 I got that right?

2 MR. BLACKWELL: Yes, Your Honor, that's right.

3 THE COURT: Okay. In case 16-4187, which is the
4 specific case number for Gareis?

5 MR. BLACKWELL: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. BLACKWELL: And so I don't raise this to argue
8 anything about it at this point. I just got notice of it
9 yesterday afternoon. But I do note that this comes in well
10 after his deposition was taken, obviously reflects
11 discussions, communications, documents provided to him by
12 Plaintiffs' counsel, not for his care, treatment and not
13 related to his diagnosis, but rather for purposes of
14 litigation strategy and liability issues.

15 And I noted that Dr. Presnal begins by saying he's
16 not an expert in the causation of infections and then goes
17 on to opine that the cause more likely than not of the
18 infection of Mr. Gareis was the Bair Hugger. So he both
19 giveth and taketh away in it, in this fairly conclusory
20 one-page affidavit.

21 So we're not sure what we're going to ask of the
22 Court with respect to it. I'm sure we're going to be asking
23 something given the timing of this, given the fact
24 Plaintiffs had it for two weeks and didn't disclose it to
25 us, and we have no idea what documents were provided when he

1 says, "I have reviewed additional materials which were
2 produced in this case since my deposition."

3 We don't know. We've had quite a few exchanges
4 with Your Honor about the nature of the exchanges with
5 treating physicians, and the Plaintiffs were so concerned
6 that we couldn't even call an administrative person for a
7 doctor to schedule a deposition because they were so
8 concerned about it. And our worry all along with this
9 (indicating) sort of thing, that unrelated to the
10 plaintiffs' care, diagnosis and treatment they're working
11 with the treaters on issues of liability or litigation
12 strategy unilaterally. We don't know about it, we're not
13 included in it, and then we get this sort of thing after
14 discovery is already done.

15 So we're going to be seeking something, and
16 underscore that I'm only raising this so that when the time
17 comes that we do, which will be very soon, there isn't the
18 claim that we were here at the status hearing and I didn't
19 say anything about it, so I just tee it up for Your Honor.

20 THE COURT: Okay. Ms. Zimmerman?

21 First of all, whose client is Mr. Gareis?

22 MS. ZIMMERMAN: Mr. Gareis is the Kennedy Hodges
23 firm and it's in South Carolina.

24 To the extent again there's not a motion before
25 Your Honor and I think that things are being previewed at

1 this point, it's my understanding that Dr. Presnal, who's
2 the treating orthopedic surgeon, had some questions towards
3 the end of his deposition as that concluded about what the
4 case was about. And he has submitted -- it's a declaration,
5 it's a piece of evidence, as there is I believe a learned
6 intermediary defense by the defendants. So to the extent
7 that there is evidence now as part of the summary judgment
8 record about whether or not Dr. Presnal would have used this
9 particular product had he been provided the information,
10 he's indicated in his affidavit that he wouldn't have.

11 Now, he's not providing expert testimony in the
12 declaration, but it is a new piece of evidence which I
13 understand has been supplemented in the Gareis case-specific
14 discovery process. He's not my client, so I'll have to
15 check with the Kennedy Hodges firm on that.

16 But to the extent that defense counsel has
17 represented something about the nature of communications
18 either with hospitals or with treating physicians, counsel
19 for 3M is certainly aware that they were in contact with
20 various hospitals on proof of product, talking with risk
21 managers and all that sort of thing. So having a
22 conversation with the client's treating physician as we
23 prepare for trial is certainly not outside the bounds of
24 reasonable and it's not a violation of any of the court
25 orders entered by Your Honor or by Judge Ericksen, and we

1 look forward to any motion that 3M may bring.

2 THE COURT: Well, consider the Court previewed. I
3 will communicate all of this to Judge Ericksen, and I'll
4 look, as will she, for any relief anybody might be asking
5 for, but as I understand it, no one is asking for anything
6 at the moment.

7 MS. ZIMMERMAN: That's my understanding.

8 MR. BLACKWELL: That's correct for today, Your
9 Honor.

10 THE COURT: Okay. All right. Anything else for
11 the good of the order, as they say? Plaintiffs?

12 MS. ZIMMERMAN: No, Your Honor.

13 THE COURT: Defendant?

14 MR. BLACKWELL: No, Your Honor.

15 THE COURT: Thank you all for coming, thank you
16 all for participating on the telephone, and we are in
17 recess.

18 (Proceedings concluded at 10:10 a.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter
for the United States District Court, do hereby
certify that the foregoing pages are a true and
accurate transcription of my shorthand notes,
taken in the aforementioned matter, to the best
of my skill and ability.

/s/ Timothy J. Willette

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